

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'सी', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI AMARJIT SINGH, JM

आयकर अपील सं./ITA No.1920/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2009-2010)

Mr. Omprakash Basnatlal Goenka, 317/318, Parvati Industrial Estate, Sunmill Compound, Lower Parel (W), Mumbai-13	Vs.	ACIT, Central Circle-14, Mumbai-400002
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AEC PG 3854 J		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri Hiro Rai
राजस्व की ओर से /Revenue by : Shri Deepkant Prasad
सुनवाई की तारीख / Date of Hearing : **05/02/2016**
घोषणा की तारीख/Date of Pronouncement **04/05/2016**

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the assessee against the order of CIT(A), Mumbai, for the assessment year 2009-2010, in the matter of order passed u/s.143(3) r.w.s.153A of the I.T.Act on the following grounds :-

1. a. *The Id. CIT(Appeals) erred in confirming the addition made by Id. ACIT on account of disallowance of Rs.10,29,682/- u/s.14A r.w.r.8D.*
- b. *The Id. CIT(Appeals) erred in holding that expenses attributed towards earning exempt income even when there were no nexus.*
- c. *The Id. CIT(Appeals) erred in considering the facts that the major investments were made for acquiring strategic business stake.*
- 2.d. *The Id. CIT(Appeals) erred in confirming the addition made by Id. ACIT on account of alleged loan of Rs.2,00,00,000/- to Shri Vinod Goenka*

2. Rival contentions have been heard and record perused. Facts in brief are that a search and seizure action u/s. 132 and survey action u/s. 133A of the I.T.Act, 1961 was carried out on 21.08.2009 in the premises

of assessee alongwith other associated persons and companies of M/s. Twinkle Group. During the course of search, the business premises of M/s. Twinkle Group companies and residential premises of Shri Omprakash Goenka, who is the key person managing the affairs of Twinkle Group companies and also Director in various group companies, was also covered and a large number of incriminating documents, diaries, registers, papers, CDs and Hard Disks etc. were found and seized. Statement of Shri Omprakash Goenka was recorded u/s.132(4) in respect of the documents found and seized. Subsequently, he voluntarily made disclosure of RS.29 cr. in h's personal capacity for the A. Yrs. 2007 -08 to 2010-11 as his additional income over and above regular income as per books of accounts to cover up the discrepancies in the account vis-a-vis the seized documents on account of unaccounted payments in purchase of land, investment in land and properties unaccounted/unvouched expenses investment in jewellery etc. relating to various concerns/ persons of the assessee group, which he owned up. During the course of assessment u/s.153A the AO disallowed claim of expenses u/s.14A and made addition of Rs.2 crore in respect of entry on seized material for advancing loan to Shri V. Goenka.

3. By the impugned order the CIT(A) confirmed the action of the AO after observing as under :-

12.8.1 Ground No. 5 is in respect of addition of RS.2 crores on account of loan given to Shri Vinod Goenka. Ld. A.O. has pointed out that documents T-6/Bundle-2 page 33 and T-6/B-6 page 10, seized from the appellant's residence showed that the appellant had given cash loan to Shri Vinod Goenka of Rs.1 crore each in April, 2008 and September 2008 totaling to

RS.2 crore. While replying to the show cause before the Ld. AO, the appellant pleaded that no such loan was ever given to Shri Vinod Goenka and the entry found in the seized papers might have been a proposal to give loan in April 2008 which he was to return in Sep. 2008

12.8.2 During the course of appellate proceedings, Ld.A.R. has more or less reiterated the same arguments which he had advanced before Ld.A.O. for supporting his claim that transaction was never executed and without prejudice to the figure involved, by no stretch of imagination it could exceed Rs.1 crore. He has further stated that Ld.A.O. made the addition based on presumption and surmises and he did not make any effort to substantiate or establish the fact of giving cash loan. In this regard, he had also referred to the decision of Hon'ble ITAT Ahmedabad in the case of ITO Vs. Bcbubhoi Kanjibhai Patel HUF in ITA No. 342 and 42931 Ahd.107 pronounced on 26.3.2010.

12.8.3 At this stage it may be relevant to refer to the appellant's statement recorded at his residence u/s.132(4) where in reply to question No.31 (as noted below), the appellant categorically stated that V.G. means " Vinod Goenka, who is a cousin of my wife Smt. Kiran Goenka. He further stated that part of these transactions were not recorded in his books of accounts.

"Q.31 During the course of search loose papers Bundle No.1 to 6 have been found and seized from your premises. Many of these pages contain entries like OPG 1 Cr. OPG 2Cr. POG 5.65Cr VG 2Cr. Please explain these entries.

A.31. OPG means Omprakash Goenka 84 VG means Vinod Goenka who is cousin of my wife Kiran Goenka. As already stated earlier part of this transaction is not recorded in my books However, I will submit the exact quantification after examining my books of accounts.

12.8.4 It may also be profitable to refer to the various seized documents as per which the appellant has himself admitted unaccounted income of more than Rs.40 crores suggesting that he had engaged in an activity for which meticulously notings were made which were found and seized during the course of search proceedings resulting into unearthing of undisclosed income of huge magnitude. Further, the appellant had himself admitted as per question No.31 above, that there were entries of "V.G. 2 crores" where V.G. means Vinod Goenka. It is obvious that Shri Vinod Goenka would never

admit having taken cash loan. No purpose would be served by examining him whether he had actually received said cash loan or not. The appellant had not just written the notings as "V.G. 2 crores" in isolation. It is also not the appellant's case that he does not know Vinod Goenka and that he had never had any transaction with Shri Vinod Goenka. If some parts of the same documents are found to be correct, and admitted by the appellant to be correct how can the other part to be incorrect. It is trite law that if a part of notings in the seized material are found to be correct, other part would also be taken to be correct.

12.8.5 As per section 132 (4A) of the I.T.Act where any books of accounts, other documents etc. are found in the possession or control of any person in the course of search it may be presumed, .

(i) That such books of accounts, other documents etc. belong or belongs to such person

(ii) That the contents of such documents and documents are true

12.8.6 Further, as per sec.292C inserted by Finance Act, 2007 with retrospective effect from 1.10.1975, the same presumption has been reiterated to be followed for any proceedings under the I.T.Act. It has been held by the Hon'ble Bombay High Court in the case of Surendra M. Khandhar 321 ITR 254 (Born) that considering Sec.292C there was a presumption that the contents of documents are true, as the document is seized from the premises in the control of the assessee and such documents belongs to the appellant. Referring to the decision of Hon'ble Supreme Court in P.R. Metrani vs. CIT 287 ITR 209(SC) Hon'ble High Court held that expression 'may presume' leads to discretion of the Court to make' a presumption based on the circumstances of the case and the presumption under sub section 132(4A) is a rebuttable presumption, however, the appellant in that case had been unable to rebut that presumption. From the facts delineating in the impugned proceedings before me, I do find a lot of similarity as the appellant has not been able to rebut the presumption that the contents of the documents were correct, specifically in view of the fact that there are plethora of other notings which ultimately resulted in overall declaration of undisclosed income more than Rs.40 crores by the appellant.

12.8.7. Once the appellant had himself admitted during the course of search that the transactions were not recorded in his

books of accounts he cannot turn around to deny the same. Hon'ble ITAT Mumbai bench in the case of Hiralal Maganla 96 ITD 113 Mum has held as under :-

- This is based on the maxim, *allegans contraria non est audiendus* (a person alleging contradictory facts should not be heard). In *Pickard v. Sears* [1837] 6 Ad & El-469, 474, it has been held that where a person "by his words or conduct Wilfully causes another to believe the existence of a certain state of thing, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In the celebrated book titled 'Administrative Law' by Sir Wlfiom Wade (Eighth Edition by Wade and Farsyth-Oxford University Press). the legal position has been explained at p. 242.as under:

"The basic principle of estoppel is that a person who by some statement or representation of fact causes another to act to his detriment in reliance on the truth of it is not allowed to deny it later, even though it is wrong. Justice here prevails over truth Estoppel is often described as a rule of evidence, but mare correctly it is a principle of law. As a principle of common law it applies only to representations about past or present facts.

22. Provisions of section 115 of the Evidence Act are also quite apposite and the case of the assessee squarely falls thereunder. Section 115 of the Evidence Act provides as under:

115 When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

23. We are aware of the principle laid down in several cases that the Evidence Act does not apply to the proceedings under the Income-tax Act and further that the artificial or technical rules of evidence are not applicable to income-tax proceedings. This aspect of the matter has received careful consideration by the Honble Supreme Court in *Chuharmal v. CIT* [1988J 172 ITR 250,255. The Honble Court has held that what is meant by saying that the Evidence Act does not apply to income-tax proceedings under the Income-tax Act is that the rigour of the rules of evidence contained in the Evidence Act is not applicable but that does not mean that when the

*taxing authorities are desirous of invoking the principles of the Evidence Act in proceedings before them, they are prevented from doing so. Besides, section 115 of the Evidence Act incorporates a salutary principle of common law based on the maxim *allegans contraria non est audiendus* (a person alleging contradictory facts should not be heard) and hence the said principle is fully applicable to the proceedings under the Income-tax Act. The provisions of section 115 of the Evidence Act provide statutory recognition to the said principle which is otherwise also applicable to all the judicial and quasi-judicial proceedings. The underlying philosophy behind the said principle being to ensure, in the words of Sir Wade in his *Administrative Law* (supra), that justice prevails over truth.*

24. In the case before us, there is no dispute that the assessee-firm through its partner, namely, Shri Pratapra/Sanghvi made the declaration of unaccounted stock and unaccounted income at the time of search and that too on oath which the Departmental Authorities accepted and upon which they did not proceed with further investigations in order to locate the whereabouts of the unaccounted stock. If Shri Prataprai Sanghvi had not made the said declaration or statement, the Departmental Authorities could have continued the search and could have investigated the entire matter on the basis of the various documents seized during the course of search. By making the disclosure of additional income of Rs. 2 crores which he offered for taxation on oath, Shri Pratoprai Sanghvi stopped the entire process of further investigation' through search as the Department accepted the disclosure and closed further investigation on the said issue. In our view, it was not open to the assessee to deny later the truth or the correctness of the declaration made at the time of search. By seeking to retract from the declaration made at the time of search, the assessee wants that it should be restored to the position in which it was before making the statement at the time of search without restoring the Department to the same position in which it would have been if the said statements were not made or if it had not accepted the said declaration made on oath. This approach of the assessee, in essence, would tantamount to his telling the Department that you accepted my lie and now your hands are tied and you can do nothing. Having made a voluntary declaration on oath and induced the Departmental Authorities to act upon the same at the time of search, the assessee cannot be permitted to turn around later and deny the truth of the aforesaid declarations or the representations made therein. Section 115 of the Evidence Act prevents him from doing so.

25. In our view, the retraction sought to be made by the assessee several months after making the declaration under section 132(4) was nothing but a well planned evidence to frustrate the efforts of the Department to unearth unaccounted income. The attempt of the assessee to retract from the said declaration is not only against the well-settled principles of common law and against the letter and spirit of section

115 of the Evidence Act but also against the principles of equity, justice and good conscience. The declaration made by Shri Prataprai Sanghvi under section 132(4) clearly fell under section 115 of the Evidence Act and hence it was not open to the assessee to retract from the said declaration after the Departmental Authorities had accepted the same and altered their position by closing the search. Further, declarations falling under section 115 of the Evidence Act do not require any corroboration. Retraction from declaration or acts falling under section 115 of the Evidence Act is also not possible at a//. The retraction filed by the assessee in the case before us is hit by section 115 and hence the Assessing Officer was justified in rejecting the same. We see no infirmity in his action. "

12.8.8. In view of the above, I do not find any infirmity in the order of the Ld.A.O. in bringing to tax the undisclosed cash loan of Rs. 2 crores given to Shri Vinod Goenka. Accordingly, this ground is dismissed."

4. Against the above order of CIT(A), the assessee is in appeal before us.
5. It was argued by Id. AR that the document found during the course of search was dumped document and did not contain any precise entry thereon. Our attention was invited to the documents so seized and it was contended that left side was complete accounts, whereas on right hand side noting was just for abbreviation and there was no actual transaction. As an alternate it was contended that one crore was sought to be given in the month of April, 2008 and it was to be returned in the month of September 2008, therefore, any addition if any, should be not more than

Rs.1 crore. With regard to disallowance u/s.14A, Id. AR contended that the AO has not excluded strategic investment while computing disallowance as per rule 8D.

6. On the other hand, Id. DR relied on the order of lower authorities.

7. We have considered rival contentions, carefully gone through the orders of authorities below and also the seized document found during the course of search as well as statement of the assessee recorded u/s.132(4), wherein assessee himself has admitted as per question No.31 that there were entries of "VG 2 crores" , where VG means Vinod Goenka, who is cousin of his wife Smt. Kiran Goenka. He further stated that part of these transactions were not recorded in his books of account. After going through the entries so recorded in the seized paper book, we found that assessee has given advances of Rs.1 crore in the month of April, 2008 to his cousin Vinod Goenka and Rs.1 crore more was given in the month of September, 2008. Both the lower authorities have dealt with the issue in great detail and after applying relevant propositions of law u/s.292C of I.T.Act and Section 115 of Evidence Act vis-à-vis the proposition of law laid down by Hon'ble Bombay High Court and Hon'ble Supreme Court, reached to the conclusion that entry in the loose papers was not found recorded in regular books of accounts, therefore, added the same in assessee's income. Nothing was placed before us to persuade us to deviate the findings recorded by lower authorities. Accordingly, we do not find any reason to interfere in the order of lower authorities. Accordingly, addition of Rs.2 crores is confirmed.

8. The assessee is also aggrieved for disallowance of Rs.10,29,682/- u/s.14A r.w.r.8D. We found that while computing the disallowance the AO has not excluded strategic investment made by the assessee. In view of the decision of Delhi Bench of the Tribunal in the case of Interglobe Enterprises Ltd., ITA Nos.1362&1032/Del/2013, order dated 4-4-2014 and the decision of Mumbai Bench of the Tribunal in the case of Garware Wall Ropes Ltd, we direct the AO to recompute the disallowance after excluding strategic investment out of average investment so made by the assessee. We direct accordingly.

9. **In the result, appeal of the assessee is allowed in part.**

Order pronounced in the open court on this 4/05/2016.

Sd/-

(AMARJIT SINGH)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 04/05/2016

प्र.कु.मि/pkm, नि.स/ PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

Sd/-

(R.C.SHARMA)

लेखा सदस्य / ACCOUNTANT MEMBER

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार

(Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai